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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

TERM NO. 285.

DORA E. ROOKER, ET AL.,
Plaintiffs in Error,

v.

FIDELITY TRUST COMPANY, ET AL., ETC.

MOTIONS TO DISMISS OR AFFIRM WRIT OF ERROR AND BRIEF THEREON.

CHARLES E. COX,
Counsel for Defendants in Error.

HENRY SEYFRIED,
Of Counsel.

E. A. HARDIN PRINT, INDIANAPOLIS

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DORA E. ROOKER, ET AL.,
Plaintiffs in Error,
v.
FIDELITY TRUST COMPANY, ET AL., ETC.,

Term No. 285

MOTION TO DISMISS OR AFFIRM

The defendant in error in the above entitled cause, by its counsel appearing in that behalf, respectfully moves the court to dismiss the appeal in said cause for want of jurisdiction, in that the judgment or decree from which the said appeal purports to have been taken by writ of error is the judgment or decree of the Supreme Court of one of the United States, to-wit, of the Supreme Court of Indiana, and is of a character not reviewable by this court, in this, to-wit, (1) the validity of no treaty or statute of, or authority exercised under the United States was drawn in question in the State Courts, nor was a decision made therein against their validity; nor (2) was there drawn in question the validity of a statute of or an authority exercised under

any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and no decision upholding their validity was made by the State Courts.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment or decree from which said appeal purports to have been taken by writ of error as aforesaid, because, even though the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest, (1) that said appeal was taken for delay only, and (2) that the questions presented for decision by plaintiff in error are so frivolous and well settled as to need no further argument.

CHARLES E. COX,
Counsel for Defendants in Error
for the purpose of these motions

HENRY SEYFRIED,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

DORA E. ROOKER, ET AL.,
Plaintiffs in Error,
v.
FIDELITY TRUST COMPANY, ET AL., ETC.,

Term No. 285

NOTICE OF SUBMISSION OF MOTION

To William V. Rooker, counsel for plaintiffs in error in the above entitled cause:

You will please take notice that on Monday, the 6th day of November, 1922, at the opening of the court, or as soon thereafter as the court can hear counsel, the motions of which the foregoing are copies will be submitted to the Supreme Court of the United States for the decision of said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

CHARLES E. COX,
Counsel for Defendants in Error for the purpose of these Motions.

HENRY SEYFRIED,
Of counsel.

Received copy of the foregoing notice, and the attached motions and brief this — day of October, 1922, at Indianapolis, Indiana.

Counsel for Plaintiffs in Error.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS OR AFFIRM WRIT OF ERROR

STATEMENT OF THE CASE.

On the record herein plaintiffs in error have attempted to have the judgment of the Supreme Court of Indiana reviewed by this Court by Writ of Certiorari or in the alternative by Writ of Error, being respectively No. 634 and No. 758 in the previous term.

On May 29, 1922, the petition for a Writ of Certiorari was denied without opinion, leaving the petition for a Writ of Error pending on the docket of the Court for the October Term, 1922, as No. 285.

Counsel for defendant in error deem that the opinion of the Supreme Court of Indiana contains a sufficient statement of the case for the purpose of a consideration of the foregoing motions. While that opinion is set out in the brief of plaintiffs in error at pages 105 to 125 inclusive it is here for the convenience of the court, set out in full as follows:

In the Case of DORA E. ROOKER, ET AL., *v.* FIDELITY TRUST COMPANY.	No. 23598

Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by Willoughby, J.:

This case is a resumption of proceedings under the mandate of this court in *Rooker v. Fidelity Trust Co.*, 185 Ind.

172. The appellants as settlers of a trust in lands sued appellee who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all duties save the sale of the trust estate, its reason for not making such sale, its purpose to carry out the sale and its hindrance by appellants' interference and claim of title. It asked an accounting that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

The court finds the facts to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana. Second, that on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real estate situated in Marion County, Indiana.

Third, that on the said 11th day of October, 1909, said plaintiffs, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company, as trustee, their warranty deed for the lands in Hamilton County.

TO HAVE AND TO HOLD, said real estate, however, in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser: it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of 6 per cent per annum, to be credited semi-annually as a debit and charge against said real estate.

THIS CONVEYANCE IS MADE subject to the taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company, by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand ($14,000) Dollars together with interest thereon and recorded in mortgage record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October, 1909, and recorded in record 97, at page 117, in the Recorder's office of Hamilton County, Indiana.

FOURTH: That on said 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-com-

plainant, Fidelity Trust Company, as trustee, their warranty deed for the lands in Marion County.

TO HAVE AND TO HOLD said real estate, however, in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said

Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said grantors and said Fidelity Trust Company, Trustee, on this date.

The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of and incumbrances or subjects to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of 6 per cent per annum, to be credited semiannually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

This conveyance is made subject to the taxes for the year 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker, and Dora E. Rooker husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of six thousand ($6,000) dollars and interest coupon notes thereon which mortgage is recorded in mort-

gage record 523, page 128, in the office of the Recorder of Marion County, State of Indiana.

That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the office of the Recorder of Marion County, Indiana.

FIFTH: That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs, Dora E. Rooker and William V. Rooker, as first parties and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in *Rooker v. Fidelity Trust Company*, 185 Ind. beginning page 173).

SIXTH: That since the execution of said warranty deeds and said written memorandum, the plainttff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

SEVENTH: That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, Trustee, and the plaintiffs, William V.

Rooker and Dora E. Rooker, have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, Trustee.

EIGHTH: That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust Company is not claiming or asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

NINTH: That prior to the commencement of plaintiffs' action namely on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four ($19,604.04) Cents and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

TENTH: That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material fur-

nished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter, upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of Six Thousand ($6,000) Dollars and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff, Dora E. Rooker, issued from time to time to the defendant and cross-complainant, Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

ELEVENTH: That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the vouches is drawn and aggregating the sum of $15,813.21.

TWELFTH: The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of $21,194.27.

THIRTEENTH: That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in the business of operating a trust company under the laws of the state of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

FOURTEENTH: That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of one hundred and fifty ($150.00) Dollars, which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent. on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty ($120.00) Dollars has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent. per annum.

FIFTEENTH: That the plaintiffs are entitled to the following credits, to-wit: Ninety-five ($95.00) Dollars, together with interest thereon at six (6) per cent. from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand ($6,000) Dollars, said sum having been charged against plaintiffs under the order and voucher

dated October 16, 1909; also a credit of Five Hundred ($500) Dollars with interest at four (4) per cent. from August 26, 1910, less Fifteen ($15.00) Dollars deducted from the principal amount as a premium upon the Surety Company bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of *William V. Rooker and Dora E. Rooker v. Ludowici Caladon Company*, in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security of deposit returned; also a rebate of Four Hundred and Two and 81/100 Dollars ($402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County lands.

SIXTEENTH: There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 ($37,007.48) Dollars; and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 ($14,271.29) Dollars; and for commission at two (2) per cent. on all funds paid out in excess of Six Thousand ($6,000) Dollars the aggregate sum of Six Hundred and Twenty and 14/100 ($620.14) Dollars from which there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 ($982.81) Dollars, together with interest thereon amounting to Two Hundred and Eighteen and 51/100 ($218.51) Dollars, being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein

in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 ($50,697.59) Dollars.

SEVENTEENTH: That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

EIGHTEENTH: That on the 21st day of June, 1917, the defendant, Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker, of which the following is a copy:

"TO WILLIAM V. ROOKER AND DORA E. ROOKER

"Pursuant to the provisions of the deed of conveyance executed to the undersigned, as Trustee, on the 11th day of October, 1909, conveying to the undersigned, as Trustee, the following described real estate in Marion County, State of Indiana, to-wit: The southeast quarter of the northeast of section 33, Township 17 north, range 4 east, containing 40 acres more or less; also the southwest quarter of the northwest quarter of section 34, Township 17 north, range 4 east, containing 40 acres more or less, and the memorandum executed concurrently therewith, notice is hereby

given that the Fidelity Trust Company, as Trustee, will ninety (90) days after the delivery hereof, publicly advertice said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

"Fidelity Trust Company, Trustee,
By W. M. Fogarty, President.

"Attest:
James G. Flaherty, Secretary."

NINETEENTH: That after the execution of said deeds of conveyance and written memorandum set forth in paragraph of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed of reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker, acting for himself and his wife, and coplaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of re-conveyance.

TWENTIETH: That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said Trust agreement, hereinbefore set out, but that said

Marion County Lands were not sold within one year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions; that ninety (90) days' notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company, as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company, as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company, as Trustee, to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said

lands under and pursuant to its power of sale contained in the memorandum of trust.

That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company, as Trustee, under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusions of law:

1. The law is with the defendant on the issues joined on plaintiffs' complaint.

2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

5. The defendant and cross-complainant is entitled to judgment on account in the sum of $50,697.00 to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at $----------.

The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company, has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres, more or less.

Also the southwest quarter of section seven (7) township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east and more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods, more or less, to White River, thence southerly along said stream with the meanderings thereof to be a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less, situated in Marion County, Indiana.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement, have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or

purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, as such Trustee, proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand ($18,000) Dollars in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-five Thousand ($65,000) Dollars; that if said Hamilton County lands do not sell for said sum of Sixty-five Thousand ($65,000) Dollars, for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands,

under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be due, then said trustee shall after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

1. To the payment of the costs of this action.

2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-seven ($50,697.00) Dollars.

4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

5. The rest and residue of any money derived form said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

1. In overruling motions to strike out the appellee's second amended counter-claim.

2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

3. In overruling motion to make second amended counter-claim more specific.

4. In overruling appellants' motion for judgment on the special findings.

5. The trial court erred in its conclusions of law.

6. In overruling appellants' motion to modify the judgment.

7. In overruling appellants' motion for a new trial.

The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of *Rooker v. Fidelity Trust Company*, 185 Ind. 172.

The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be

predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams v. Jennings, 164 Ind. 555;
Pfau v. State ex rel., 148 Ind. 539.

In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counter-claim sue the appellants on the subject-matter of the trust estate on the facts set upon in the counter-claim for the reason that the counter-claim is not relevant or germane to the complaint.

The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong-doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost, and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor, of the defendant or which tend to reduce the plaintiff's claim or demand for damages.

Burns 1914, 355.

A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.

Stanley v. N. W. Ins. Co., 95 Ind. 254;
Excelsior Clay Works v. DeCamp, 40 Ind. App. 26.

A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.

Woodruff v. Garner, 27 Ind. 4.

The purpose of a cross bill is to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill.

10 R. C. L., p. 483—261 et seq.

In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a cross bill which would settle all the rights of all the parties in all of their relations in the subject-matter, but it was the duty of the court, if necessary, to require a cross bill to be filed which would enable it to completely settle the controversy. See *Sims v. Burk*, 109 Ind. 214.

A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one.

Bunch v. Graves, 111 Ind. 351;
Nave v. Powell, 62 Ind. App. 274.

The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact two remedies are available, which is not true in this fact, as the Supreme Court has

decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counter-claim.

In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with certainty what is vaguely stated in the pleading.

Elliott's App. Proc. 665;
Failey v. Gribbling, 128 Ind. 110.

The appellee, in its counter-claim, set up very fully and in circumstantial detail the trust and its relation to it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

The fourth error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the

plaintiffs each respectively moved the court for judgment in their favor on the special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party.

Dickson et al. v. Rose, 87 Ind. 103;
Barner v. Bayless, 134 Ind. 600;
Chicago R. R. v. State ex rel., 159 Ind. 237;
Medical College v. Commingore, 140 Ind. 296.

Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it.

Ewbank's Manual (2d. Ed.) 24b;
Dickson v. Rose, 87 Ind. 103;
Barner v. Bayless, 134 Ind. 600.

The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. *Chicago S. E. Ry. Co. v. State ex rel.*, 159 Ind. 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-com-

plaint; and that therefore the judgment was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counter-claim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. *Rose v. City of Jeffersonville*, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

And afterwards, to-wit: On the 12th day of October, 1921, the court being fully advised overruled the petition for rehearing heretofore filed herein by appellant.

It is therefore considered by the court that the judgment of the court below in the above entitled cause, be in all things affirmed at the cost of the appellants, all of which is ordered to be certified to said court.

And it is further considered by the court that the appellee recover of the appellants the sum of $48.05 for its costs and charges in this behalf expended. (Transcript of Record, pp. 455 to 469, inclusive.)

BRIEF OF THE ARGUMENT ON MOTIONS.

The Federal Supreme Court has no jurisdiction under the Act of September 6, 1916 (39 Stat. at Large 726, Chap. 448, Com. Stat. 1916, Sec. 1207) of a writ of error to a state court in a case in which there is no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a state, challenged because of repugnance to the Constitution, treaties or laws of the United States. As no question of either class was drawn in question, or decided by, the state courts in this case the writ of error was improperly sued out and should be dismissed.

Stadleman v. Miner, 246 N. S. 544, 62 L. ed. 875;
Coon v. Kennedy, 248 U. S. 457, 63 L. ed. 358.

It is manifest from the opinion of the State Court, even if plaintiff actually or in good faith raised any question of either such class reviewable here by writ of error for the State Court to determine, which is denied, that the decision and judgment of the State Court rests firmly upon questions of sound and settled local and general law. In such case this court will not take jurisdiction to review the judgment, and the writ of error should be dismissed.

Enterprise Irrigation District v. Farmers' Mutual Canal Co., 243 U. S. 157, 61 L. ed. 644;
Bilby v. Stewart, 246 U. S. 255, 62 L. ed. 701;
Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 61 L. ed. 1153;

United States Fidelity & Guaranty Co. v. Oklahoma, 250 U. S. 111, 63 L. ed. 876;

Hardin-Wyandot Lighting Co. v. Sandusky, 251 U. S. 173, 64 L. ed. 210;

Howat v. Kansas, — U. S. —, Nos. 154 and 491, October Term, 1921, Decided March 13, 1922;

Minneapolis, etc., R. Co. v. Washburn Lignite Coal Co., 254 U. S. 370, 65 L. ed. 310.

These Federal questions must be real, not fictitious or frivolous, to be within the reviewing power of this court by writ of error. As no real Federal question was ever even presented to the State Courts and certainly was never drawn into the case or decided by the State Courts, no case cognizable by this court in presented.

Hamblin v. Western Land Co., 147 U. S. 531, 37 L. ed. 267;

St. Louis, etc., Ry. Co. v. Missouri, 156 U. S. 478, 39 L. ed. 502;

Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871;

Deming v. Carlisle Packing Co., 226 U. S. 102, 57 L. ed. 140;

Great Northern Ry. Co. v. Alexander, 246 U. S. 276, 62 L. ed. 713.

Even if the final assignment of error, made on the record by plaintiff in error, were not so ill founded, frivolous and wantonly scandalous as effecting the Supreme Court of Indiana that it cannot command the consideration of this court, it can not be considered for another reason. It is founded on the action of the State Court in overruling a

petition for rehearing without written opinion or comment. In such circumstances there is no basis for a writ of error.

Jett Brothers Distilling Co. v. Carrollton, 252 U. S. 1, 64 L. ed. 421;

Anderson v. Dunn, — U. S. —, No. 27, October Term, 1921. Decided November 7, 1921.

The facts embodied in the finding of the trial court and set forth in the opinion of the Supreme Court of Indiana plainly disclose that the questions presented are frivolous, that the decision of the State Court was right on the merits, that plaintiffs in error have long been waging vexatious litigation, were justly defeated on the judgment of the State Court on the facts, and that this attempted review is solely for delay and the great embarrassment of defendant in error. Hence the writ of error should be dismissed or the judgment affirmed.

CHARLES E. COX.
Counsel for Defendant in Error.

HENRY SEYFRIED,
Of Counsel.

Office Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

285

LAW NO. 785 OCTOBER TERM 1921

ON WRIT OF ERROR

PETITION FOR SUPPLEMENTAL WRIT OF ERROR WITH ASSIGNMENT OF ERRORS

DORA E. ROOKER
WILLIAM V. ROOKER
Plaintiffs in Error

VS.

FIDELITY TRUST CO.,
in its Corporate Capacity
Proper

FIDELITY TRUST CO.,
as trustee of the Estate of
Dora E. Rooker

Defendants in Error

FLOYD G. CHRISTIAN,
RALPH H. WALTZ,
of Counsel.

WILLIAM VELPEAU ROOKER
Attorney for Plaintiffs
in Error.

LEVEY, INO'PLS.

IN THE

SUPREME COURT

OF THE

UNITED STATES

LAW NO. 785

PETITION FOR SUPPLEMENTAL WRIT OF ERROR TO THE HAMILTON CIRCUIT COURT OF INDIANA

Dora E. Rooker,
William V. Rooker,
Plaintiffs in Error.
vs.
Fidelity Trust Company, in its
Corporate Capacity proper,
Fidelity Trust Company, as
Trustee of the estate of Dora E. Rooker,
Defendants in Error.

PETITION OF PLAINTIFFS IN ERROR FOR SUPPLEMENTAL WRIT OF ERROR WITH THEIR ASSIGNMENT OF ERROR

To the Honorable William H. Taft, Chief Justice of the United States, and the Associate Justices:

Dora E. Rooker and William V. Rooker, plaintiffs in error in the above entitled cause show by this their petition to this

Honorable Court that in the records, proceedings and decisions of the Hamilton Circuit Court of Indiana, said court pretending in the premises to be acting in accordance with the opinion, judgment and mandate of the Supreme Court of Indiana, the same being the highest court of said State in which a decision could be had in this suit, manifest errors have occurred greatly to the prejudice and damage of said Dora E. Rooker and William V. Rooker and that said occurrences in part have been subsequent to the time when this court acquired jurisdiction upon writ of error to review said judgment of the Supreme Court of Indiana, and that said occurrences in so far as they have not been subsequent to the time when this court acquired its said jurisdiction in said cause, nevertheless involve questions and issues which must be considered and determined by this court in said cause and petitioners say:

I

Dora E. Rooker and William V. Rooker make this their petition for a supplemental writ of error to be issued out of this court and directed to the Hamilton Circuit Court of Indiana to bring before this court for examination and determination the record, proceedings and judgment of said Hamilton Circuit Court in said cause.

II

Dora E. Rooker and William V. Rooker in this, their petition for a supplemental writ of error, hereby reaffirm every statement of fact and every recital and every prayer for relief, as stated, set forth and contained in their original petition for a writ of error and in their original assignment of errors herein, except as the same may be modified by this their petition for a supplemental writ of error and in their supplemental assignment of errors hereto attached and made a part of this petition, wherein they respectfully show this Honorable Court that there arise upon the record in the case of Dora E. Rooker and William V. Rooker, plaintiffs, against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants, in the Hamilton Circuit Court, certain Federal questions, to-wit:

(1.) The Hamilton Circuit Court of Indiana erred in its ruling order and judgment of February 27, 1922 in sustaining the petition of the Fidelity Trust Company for the approval of a lease made by that company with Thomas West wherein and whereby the Court took from these petitioners and delivered to said Fidelity Trust Company and Thomas West, the possession, use, rents and profits of certain lands being part of the trust estate of Dora E. Rooker situate in Hamilton County, said action of said Hamilton Circuit Court being taken without any notice whatsoever to the said Dora E. Rooker and William V. Rooker and without their knowledge and without the knowledge of either of them; that by said order, proceedings and judgment said Hamilton Circuit Court took the property of these petitioners without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(2.) Said Hamilton Circuit Court erred in its ruling order and judgment of March 2, 1922 in overruling the motion of said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court and the proceedings had thereon, made and entered into on, to-wit: the 27th day of February, 1922 wherein and whereby the said Hamilton Circuit Court approved a pretended lease of a part of the lands of the trust estate of Dora E. Rooker situate in said Hamilton County and without any notice whatsoever thereof to Dora E. Rooker and William V. Rooker and without the knowledge of Dora E. Rooker and William V. Rooker or either of them, in which said motion the said Dora E. Rooker and William V. Rooker showed to the court that they and neither of them had any knowledge or information concerning said order and judgment of February 27, 1922, and the proceedings had thereon until on the third day of March, 1922, and that because of the absence of notice to and information on the part of said Dora E. Rooker and William V. Rooker said order and judgment of February 27, 1922, and the proceedings had thereon, took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contra-

vention of the Fourteenth Amendment of the Constitution of the United States.

(3.) The Hamilton Circuit Court of Indiana erred in its order and judgment of February 27, 1922, and in the proceedings had thereon for the reason that at the time said order and judgment were made and entered and said proceedings had, the jurisdiction of said subject matter and of the parties thereto was vested exclusively in the Supreme Court of the United States by reason whereof said occurrences in said Hamilton Circuit Court were *coram non judice* and void, and by reason whereof said Hamilton Circuit Court took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the laws all in contravention of the Fourteenth Amendment of the Constitution of the United States.

(4.) That the Hamilton Circuit Court of Indiana erred in entertaining and exercising jurisdiction of divers motions and petitions for rule to show cause made and entered against Dora E. Rooker and William V. Rooker by the Fidelity Trust Company, Trustee, for the reason that the jurisdiction of the subject matter of said motions and petitions and of the parties thereto, was at the time, exclusively in the Supreme Court of United States by reason whereof said proceedings in said Hamilton Circuit Court were *coram non judice* and void and thereby said Hamilton Circuit Court took the property of Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the laws all in contravention of the Fourteenth Amendment of the Constitution of the United States.

III

Dora E. Rooker and William V. Rooker in this their petition, for a supplemental writ of error, further say and would show the court that divers errors to the prejudice and damage of these petitioners and in contravention of their rights under the Constitution and laws of the United States arising from the record of said Hamilton Circuit Court as more particularly stated and set forth in the assignment of errors made by said Dora E. Rooker and William V. Rooker in aid of this, their

petition, for a supplemental writ of error, and which assignment of errors marked exhibit A is hereto attached and made a part of this petition.

WHEREFORE, petitioners pray that a supplemental writ of error be allowed directed to the Hamilton Circuit Court of Indiana and that a transcript of the record, proceedings and judgment and the papers upon which the various rulings, orders and judgments were based, duly authenticated as provided by law, be ordered sent to the Supreme Court of the United States at Washington, D. C. under the rules of such court in such cases made and provided and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

William Velpeau Rooker,
Attorney for Petitioners.

State of Indiana }
County of Marion } ss

Dora E. Rooker and William V. Rooker being first duly sworn on their oath say that the facts stated in the foregoing petition are true, and further affiant saith not.

Dora E. Rooker.
William V. Rooker.

Subscribed in my presence and sworn to before me this 13th day of May, 1922. Witness my hand and official seal.

Wm. H. Howard,
Notary Public.

[SEAL]

My commission expires May 9, 1923.

IN THE SUPREME COURT OF THE UNITED STATES
LAW NO. 785

OCTOBER TERM, 1921

SUPPLEMENTAL ERROR TO THE HAMILTON CIRCUIT COURT OF INDIANA

Dora E. Rooker,
William V. Rooker,
Plaintiffs in error.
vs.
Fidelity Trust Company in its corporate capacity proper,
Fidelity Trust Company as Trustee of the estate of Dora E. Rooker,
Defendants in error.

ASSIGNMENT OF ERRORS

Dora E. Rooker and William V. Rooker, plaintiffs in the cause above entitled, in connection with their petition for a supplemental writ of error herein to the Hamilton Circuit Court of Indiana, make this their supplemental assignment of errors against the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, defendants in error, and plaintiffs in error say: That these plaintiffs in error hereby reaffirm every statement of fact and every recital and every prayer for relief all as stated, set forth and contained in their original assignment of errors herein, except as the same may be modified by this their supplemental assignment of errors, and upon which supplemental assignment of errors they say that there is manifest error in the record, proceedings and judgment of the Hamilton Circuit Court of Indiana supplemental to the transfer of the jurisdiction of this cause to this court from the Supreme Court of Indiana in each of the particulars following: to-wit:

(1.) Said Hamilton Circuit Court erred in its ruling, order and judgment of March 7, 1922, in overruling the motion of the said Dora E. Rooker and William V. Rooker to set aside and vacate the order and judgment of said Hamilton Circuit Court, and the proceedings had thereon, made and entered on, to-wit: the 27th day of February, 1922, which motion was to the effect following:

(a.) That said order, and judgment and proceedings had therein were wholly void for the reason that same were made, entered and taken without any notice whatever to said Dora E. Rooker and William V. Rooker, or either of them, and wholly without their information and without the information of either of them.

(b.) That the jurisdiction of the parties to the subject matter of the proceedings stated in said motion was, and for many weeks continuously last past had been, exclusively in the Supreme Court of the United States, as must be and was apparent upon the facts in the premises, to-wit: The real estate in question and the custody thereof and the right to the use and possession thereof and the right to the rents and profits thereof are a part of the subject matter of a controversy between the said Dora E. Rooker and William V. Rooker as plaintiffs, and the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, as defendants, which said controversy was at one time, but not since the year 1919, pending in said Hamilton Circuit Court as Cause No. 16,338; that on to-wit: the 31st day of December, 1918, a judgment adverse to the said Dora E. Rooker and William V. Rooker was rendered in said Hamilton Circuit Court in said cause; that said Dora E. Rooker and William V. Rooker duly took and prosecuted their appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that on, to-wit: the 22nd day of June, 1921, the Supreme Court of Indiana affirmed said judgment of said Hamilton Circuit Court and thereafter, on the 12th day of October, 1921, said Supreme Court overruled in said cause the petition for a rehearing of the said Dora E. Rooker and William V. Rooker; that on, to-wit: the 10th day of November, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court of Indiana for the purpose of an application to the Supreme Court of the United States and to the Justices thereof for a Writ of Error to the Supreme Court of Indiana in said cause and for a Writ of Certiorari to be directed to the Supreme Court of Indiana by the Supreme Court of the United States in said

cause; afterwards on, to-wit: the 5th day of December, 1921, the said Dora E. Rooker and William V. Rooker lodged in the office of the Clerk of the Supreme Court of the United States their transcript of said record, proceedings and judgment and at the same time the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of the United States their petition for a Writ of Certiorari in said cause to be issued out of the Supreme Court of the United States and directed to the Supreme Court of Indiana, and said petition was duly docketed as cause pending in the Supreme Court of the United States and at the same time the said Dora E. Rooker and William V. Rooker filed their briefs and made their cash deposit of money, all as required by the rules and practice of the Supreme Court of the United States; that afterwards on, to-wit: the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States in said cause was issued on petition therefor of the said Dora E. Rooker and William V. Rooker, and at the same time said Dora E. Rooker and William V. Rooker filed their supersedeas bond conditioned as provided by law for payment of all damages and costs, which said bond was duly approved by the Chief Justice of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker filed their citation and proof of service thereof in the office of the Clerk of the Supreme Court of Indiana; that on December 19, 1921, the said Dora E. Rooker and William V. Rooker lodged in said Clerk's office a copy of said Writ of Error in said cause for said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that on December 22, 1921, Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana their praecipe for a transcript of the record, proceedings and judgment of said Supreme Court in said cause on said Writ of Error; that thereafter said Clerk duly prepared said transcript and transmitted the same to the Clerk of the Supreme Court of the United States where the same was duly docketed and was pending as Cause No. 785 October Term, 1921, in the Supreme Court of the United States at the time when said proceedings

were had as herein complained of in said Hamilton Circuit Court of Indiana in said cause.

(c.) That said order and judgment of February 27, 1921, of the Hamilton Circuit Court of Indiana and the proceedings had thereon to take the property of the said Dora E. Rooker and William V. Rooker without due process of law nad in denial of equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, for the reason that said order and judgment were taken wholly without any notice whatsoever to the said Dora E. Rooker and William V. Rooker, or either of them, and without their having any knowledge whatsoever that the petition upon which said order and judgment were founded was filed and pending and being heard and determined in said Hamilton Circuit Court.

(d.) That said order and judgment and the proceedings had thereon take the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, for the reason that said Hamilton Circuit Court, in which said order and judgment and the proceedings had thereon were taken, was wholly without jurisdiction of the parties and the subject matter of said petition for the reasons heretofore stated in recital of the steps taken to lodge and vest the jurisdiction of said parties and of said subject matter in the Supreme Court of the United States.

II

(a.) The Hamilton Circuit Court of Indiana erred in taking and exercising jurisdiction of the petition filed on the 27th day of February, 1922, said petition being to the effect following:

The Fidelity Trust Company, Trustee, represented to the court that said Trustee since the affirmance by the Supreme Court of Indiana of the decree of said Hamilton Circuit Court directing said Trustee to sell lands and tenements in Hamilton County, Indiana belonging to, and constituting a part of the trust estate of Dora E. Rooker, had made effort to sell said land and tenements but had not been able to do so and would not be able to do so before the beginning of the crop year on

March 1, 1922, for the reason that the plaintiffs, Dora E. Rooker and William V. Rooker, were now attempting to perfect an appeal of said cause from the Supreme Court of Indiana to the Supreme Court of the United States; that unless said Hamilton County lands of said trust estate were rented and farmed for the crop year 1922 it would cause loss and waste to said trust estate and that, therefore, said trustee had tentatively leased said lands to one Thomas West for said year on a basis of grain rent, which lease said trustee then and there tendered the court and asked that the same be approved by the court and ordered delivered.

(b.) The Hamilton Circuit Court erred in sustaining the petition of the Fidelity Trust Company, Trustee, approving the lease of lands of said trust estate in said Hamilton County and in ordering said lease to be delivered and in placing said Thomas West in possession of said lands; that said order and judgment of said Hamilton Circuit Court takes the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

(c.) The Hamilton Circuit Court of Indiana erred in disregarding and denying the additional answer of Dora E. Rooker and William V. Rooker to the petition of the Fidelity Trust Company as Trustee for a Writ of Assistance, which additional answer was filed in said Court on the 10th day of January, 1922, and was to the effect following, to-wit: That the said Dora E. Rooker and William V. Rooker made their plea by said answer to the jurisdiction of said Hamilton Circuit Court in the matter of the petition of the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker for a Writ of Assistance, the said plea of said Dora E. Rooker and William V. Rooker to the jurisdiction of said Hamilton Circuit Court in the premises being to the effect following, to-wit: That said Hamilton Circuit Court should proceed no further in the premises for the reason that the jurisdiction of the subject matter of the cause and the parties thereto was exclusively in the Supreme Court of the United States upon the facts following, to-wit: On the 12th day of October, 1921, this cause was pending in the Supreme Court of Indiana on appeal from the judgment of said Hamilton

Circuit Court and on said day said Supreme Court overruled a petition for rehearing; on the 14th day of December, 1921, the said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana, their petition for a Writ of Error to the Supreme Court of the United States in said cause and they filed at the same time and in the same place their Assignment of Errors; that thereupon said petition for a Writ of Error was presented to the Chief Justice of the Supreme Court of Indiana, who allowed the same and fixed the appeal bond at the penal sum of One Thousand Dollars, conditioned as provided by law for the payment of all damages and costs and approved the New Amsterdam Casualty Company of New York as surety on said bond; that thereupon said bond so fixed and conditioned was approved by the Chief Justice of the Supreme Court of Indiana and filed in said cause in the office of the Clerk of said Supreme Court; that on the 15th day of December, 1921, the Writ of Error of the Supreme Court of the United States issued in the name of the President, bearing teste of Noble C. Butler, Clerk of the District Court of the United States for the District of Indiana and the seal of said court, was filed by the said Dora E. Rooker and William V. Rooker in said cause in the office of the Clerk of the Supreme Court of Indiana; that on the 17th day of December, 1921, said Dora E. Rooker and William V. Rooker as appellants in said cause to the Supreme Court of Indiana and as plaintiffs in error in said cause in the Supreme Court of the United States, filed in the office of the Clerk of the Supreme Court of Indiana their citation to the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of said Dora E. Rooker, commanding their presence as required by law in said cause in the Supreme Court of the United States and together with said citation said Dora E. Rooker and William V. Rooker filed in the office of the Clerk of the Supreme Court of Indiana the acknowledgment of service of said citation on said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as said Trustee; that on the 19th day of December, 1921, said Dora E. Rooker and William V. Rooker as said appellants in the Supreme Court of Indiana, and the said plaintiffs in error in said cause in the Supreme

Court of the United States lodged for said defendants in error a copy of said writ of error in the office of the Clerk of the Supreme Court of Indiana; that on the 22nd day of December, 1921 said Dora E. Rooker and William V. Rooker filed their praecipe in the office of the Clerk of the Supreme Court of Indiana for a transcript of the record, proceedings and judgment of the Supreme Court of Indiana in said cause and with said praecipe they filed the acknowledgment of service thereof on said defendants in error; that said Dora E. Rooker and William V. Rooker upon information and belief stated that the Clerk of the Supreme Court of Indiana had at that time practically completed said transcript and had informed them that he would have said transcript in the office of the Clerk of the Supreme Court of the United States all within the time and manner provided by law.

III

That the Hamilton Circuit Court erred in accepting and retaining jurisdiction of a certain petition filed on the 16th day of November, 1921, in said cause by the Fidelity Trust Company as trustee for an attachment for contempt against Dora E. Rooker and William V. Rooker and for a Writ of Assistance to put said Fidelity Trust Company in possession of lands of the trust estate in said Hamilton County which said motion for attachment and petition for Writ of Assistance were in substance as follows to-wit:

"The Fidelity Trust Company, Trustee, defendant and cross-complainant in the above entitled cause, respectfully shows to the court and avers the facts to be that heretofore said cause was submitted to the court for finding, judgment and decree upon issues formed upon plaintiff's complaint and upon defendant's counter-claim and cross-complaint; that the finding was against said plaintiffs and for defendant on the issues formed on their complaint and was for defendant and against plaintiffs on the issues formed on its counter-claim and cross-complaint; that this court, on December 21, 1918, rendered and entered of record in the records of this court its judgment and decree upon its said finding in which judgment and decree it was adjudged and decreed by this court that this defendant and cross-complainant, as such trustee, then held the legal

title to certain lands and the appurtenances thereto belonging, in said judgment and decree and hereinafter described, and as such trustee was then fully empowered and under the duty to sell and convey the fee simple title to the same and to give full possession of the same; that said lands are described as follows:

All of the west half of the north half of Section eighteen (18), township eighteen (18) north, range five (5) east, lying west of the Lake Erie and Western Railroad containing ninety-two (92) acres, more or less.

Also the southwest quarter of section seven (7), township eighteen (18) north, range five(5) east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4) east, containing sixty (60) acres, more or less, and lying south and east of White River.

Also that part of the northeast quarter of section thirteen (13), township eighteen (18) north, range four (4) east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two rods more or less to White River, thence southerly along said stream with meanderings thereof to a point 29.95 rods south of the north line of said section; thence east 65.80 rods; thence south 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4) east, containing forty (40) acres, more or less.

Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north of range four (4) east, containing forty acres, more or less, situated in Marion County, Indiana.

It was in said judgment and decree further adjudged and decreed that this defendant was then and there entitled on its account against said trust estate in said lands to be paid out of the proceeds of the sales of said lands so held in trust by it in the sum of $50,697.

It was further in said judgment and decree adjudged and

decreed that said plaintiffs had then parted with all their title to said real estate, and the appurtenances thereunto belonging and the right to the possession thereof and the use, rents and profits thereof, and that they then had no interest therein other than an interest in the proceeds of the sale of said real estate contigent wholly upon a sale thereof at such a price that, after the payments of costs, liens, said judgment on account for $50,697 and the further reimbursement of said defendant trustee of such sum or sums as might accrue to it in the execution of said trust an unappropriated sum might still remain in defendant's hands as such trustee; that any other interest in or control over said lands than said interest in such proceeds, aforesaid theretofore and then being asserted by said plaintiffs, adverse to the title of said trustee was then and there wrongful and without right and unfounded and obstructive of the completion of the execution of said trust by said defendant and that said plaintiffs were then and there and thereby each and both perpetually enjoined from denying or disputing the title of said defendant as such trustee to said lands and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said defendant trustee and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said bonds.

It is further in said judgment and decree ordered and adjudged and decreed that said defendant, trustee, should proceed under the terms of the deeds and trust agreement under which it held title, to sell said lands and to proceed and first make sale of said Marion County lands and later to make sale of said Hamilton County lands, using due diligence to procure the highest bids therefor, and to submit forthwith any such sales to the court for approval or disapproval.

Said judgment and decree further directed the application of the proceeds of such sales.

And defendant further avers, that at the conclusion of the hearing and trial of said cause and before the finding and judgment and decree rendered therein as aforesaid, this court did, by its interlocutory order therein duly made and entered

by the agreement of the parties to said action, plaintiffs and defendants, on July 31, 1918, appoint the Wainwright Trust Company of Noblesville, Indiana, receiver to take charge of said Hamilton County lands and rent the tillable land for cultivation, excepting house, garden and pasture field next to the barn, and to collect the proceeds and apply and distribute the same under the direction of the court; that said trust company did appear in open court on said day and did accept said trust and did qualify as such receiver, and has never reported to this court nor been discharged by it from said trust.

And defendant further avers that said defendants filed in the Supreme Court of Indiana a vocation appeal from aforesaid judgment in said cause rendered and entered of record as aforesaid on December 21, 1918; that in said appeal no bond was ever given and no supersedeas order was ever asked, granted or issued stayed execution on said judgment and that the same has been and remained in full force and effect and is now, and that said judgment was, on June 22, 1921, by said Supreme Court in all things fully confirmed and affirmed and thereafter plaintiffs filed a petition for a rehearing thereof which was on October 12, 1921, in all things overruled and said judgment became absolutely final.

And plaintiff avers that it proceeded under the mandate of said judgment and decree to offer for sale and to procure a purchaser and to sell said Marion County real estate; that it reported to this court for its approval or disapproval a sale thereof to the Triangle Realty Company, a corporation of Indianapolis, Indiana, on April 7, 1919, and that plaintiffs appeared and excepted and objected to the approval of such sale and such proceedings were had in this court; that such objections and exceptions were not sustained but overruled and said sale was ordered and was by this court approved and confirmed and the deed ordered executed by delivery to said Triangle Realty Company; that said plaintiffs took an appeal from said order which appeal is still pending in the Supreme Court of Indiana, but that no bond was ever given and no stay of execution or supersedeas order for a stay or proceedings thereon was ever asked or issued by this or the Supreme Court and such order has ever since been and remained and is now

in full force and effect: that defendant did, pursuant to said order execute its deed by delivering to said Triangle Realty Company and received the consideration of said sale, to-wit, the sum of $16,000.

And defendant further avers that notwithstanding the aforesaid judgment and decree of December 21, 1918, said plaintiffs, Dora E. Rooker and William V. Rooker, have at all times since claimed to be the owners of said real estate and entitled to the use, occupancy, rents and profits thereof to the entire exclusion of defendants; that without right and without the knowledge of this defendant and without the knowledge or approval of the court said plaintiff procured said Wainwright Trust Company, receiver as aforesaid, to make leases to one West for the crop, years 1919 and 1920, of the tillable parts of said Hamilton County lands for a grain rental with provisions therein that the said tenant should deliver the landlord's share of such crop rental to said Dora E. Rooker; that said West did, while a tenant under said leases, raise large quantities of grain and hay on said lands the amount and value of which are at this time unknown to the defendant, and did deliver one-half thereof to said Dora E. Rooker and said William V. Rooker, all without the knowledge or consent of this defendant or of this court, and defendant avers that said plaintiff unlawfully and in violation of the decree of this court converted said crops to their own use; that in the year 1920 said plaintiffs without the knowledge of defendant or this court took the rental of said Hamilton County lands out of the hands of this court's receiver, said Wainwright Trust Company, and themselves rented the same to one Thomas West for a grain rent for the crop year 1921, providing therein that he should deliver the landlord's share of the crops to said plaintiffs; that in the year 1921, said West did raise on said lands a large quantity of oats one-half of which he delivered to said plaintiffs who have converted the same to their own use; that said West did in said 1921 produce on said lands a large quantity of hay and did deliver to said plaintiffs as the landlords share thereof fifty tons of the value of $600.00, which the said plaintiffs have converted to their own use; that said West in said year did produce on said lands more than 3000 bushels of corn of the net value of $1000 of which plaintiffs

are claiming one half to be delivered to their order to the entire exclusion of defendant, and demanding that it be so delivered and that they are threatening said West with legal action if he does not comply with such demand and are seeking by threats and intimidation to prevent him from gathering his share of said corn if he does not so comply.

And defendant further avers that at the time of the sale of said Marion County land in 1919 as aforesaid there was then on said land one James Wheatley as a tenant farming the same under a lease theretofore executed by plaintiffs that said tenant intervened and asked to have his rights protected; that said sale was made to the purchaser subject only to the tenant's rights to his share of the crops thereon for the year 1919, the landlords share of the crops going to said purchaser all of which was shown by the order approving said sale; that under said sale and under said judgment and decree of December 21, 1918, said purchaser was entitled to immediate possession and to have said tenant attorn to it as his landlord and deliver its share of the crops to it all of which said tenant was then and there informed by defendant; that said plaintiffs in defiance and disregard of said judgment and decree and said order approving said sale, by threats and intimidation, prevailed upon said tenant to refuse to attorn to said purchaser as the owner of said premises and to refuse to deliver possession to it of said premises and to refuse to deliver to it the landlord's share of said crops and to continue to recognize plaintiffs as the owners of said lands and the landlords of said tenant and to hold possession thereof as such and to deliver to them the landlord's share of said crops; that all of this, said tenant, so influenced by plaintiffs acting by and through said William V. Rooker did, and has ever since up to and including the day of 1921, continue to do; that in the years 1919, 1920 and 1921 said tenant raised and reaped on said lands large quantities of oats, wheat, corn and other crops, the respective amounts thereof being unknown to defendant at this time and delivered the landlord's share thereof to said plaintiffs which they have unlawfully converted to their own use; that on the day of , 1921, said purchaser received possession of said lands and put its own tenant in possession thereof whereupon on the

day of October, 1921, said William V. Rooker entered upon said premises and roughly informed said tenant that he, said tenant was a trespasser on said premises and that he, Rooker was the owner thereof with the right to the possession and use thereof.

And defendant further avers that at all times since the rendition and entry of said judgment and decree of December 21, 1918, said plaintiffs have resided on and occupied and held possession of the dwellings and other appurtenances of said Hamilton County lands to the entire exclusion of defendant and prospective purchasers thereof; that as long as plaintiffs remain in possession thereof and of said lands it will be impossible to make a sale of the same as required by said judgment and decree to the advantage of said trust except at a great sacrifice; that during the long litigation which plaintiffs have carried on they have continued in possession of said premises and have allowed the same greatly to depreciate in value and during all of said time defendant has received no return therefrom; that since said judgment and decree defendant has continued to pay all charges against said lands, including taxes, insurance etc.; that the great delay in making sale of said lands under said decree has caused defendant a loss of its funds in that by reason of plaintiff's conduct and the depreciation of said property it can not now be sold at a price which will pay the costs and expenses and reimburse it fully for its outlay and interest.

And defendant further avers that on November 8 and 9, 1921, it formally in writing made demand of plaintiffs, each and both, that they forthwith vacate said premises and surrender and deliver to it said Hamilton County lands and appurtenances which demand was refused by them and they and each of them refused to comply therewith.

And defendant further avers that plaintiffs are now threatening and preparing to appeal from the decision of the Supreme Court of Indiana to the Supreme Court of the United States; that said proposed appeal is not in good faith for the reason that no question cognizable by or within the appellate jurisdiction of said latter court was drawn into the case, or involved in it or decided either by the Circuit Court of Hamilton County or the Supreme Court of Indiana; that said proposed appeal is

for the sole purpose of attempting to prevent defendant from carrying out the judgment and decree of this court and executing its trust.

And defendant avers that defendant can not take possession of said lands and complete the execution of its trust without the further action of this court.

Wherefore, defendant prays the court that said cause be redocketed and that this court's former judgment and decree may be directed to be forthwith carried specifically into execution by ousting said plaintiffs from the occupancy and possession of said lands and appurtenances and by putting defendant into possession thereof; and that a writ of assistance be awarded to defendant to put it in possession of said land and appurtenances and to oust said plaintiffs their agents, servants and all acting for and claiming under them, and defendant prays for all proper relief in the premises which a court of equity may accord."

IV

The Hamilton Circuit Court of Indiana erred in sustaining the demurrer of the Fidelity Trust Company as Trustee to the plea in abatement of Dora E. Rooker and William V. Rooker filed in said court under their special appearace to the petition for writ of assistance, etc. which plea in abatement was in substance, as follows:

Dora E. Rooker and William V. Rooker, hereby enter their special appearance to the "Petition for Writ of Assistance, etc." filed herein by the Fidelity Trust Company, Trustee, on the 16th day of November, 1921, for the sole purpose of pleading to the jurisdiction of this court over the subject matter of said petition and over the persons of these respondents to said petition and for cause these respondents say:

1. That these respondents claim the right and privilege to take the cause direct from the Supreme Court of Indiana to the Supreme Court of the United States for review upon writ of error and upon writ of certiorari; or either of said writs because of certain questions arising upon the decision and judgment of the Supreme Court of Indiana involving the rights of these respondents under the constitution and laws of the United States, to-wit:

A. That the Indiana Practice Act of March 15, 1913, as amended and approved March 5, 1915, entitled "An Act Concerning Proceedings in Civil and Criminal Cases" impairs the obligation of contracts, and of the contract involved in this suit in contravention of Article One of the Constitution of the United States.

B. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

C. That the decision and judgment of the Supreme Court of Indiana in this cause denies to these respondents the equal protection of the laws in contravention of the 14th Amendment of the Constitution of the United States.

D. That the decision and judgment of the Supreme Court of Indiana affirming the judgment of the Hamilton Circuit Court in this cause takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

E. That the decision and judgment of the Supreme Court of Indiana takes the property of these respondents without due process of law in contravention of the 14th Amendment of the Constitution of the United States.

2. That these respondents claim their right and privilege to take said cause directly to the Supreme Court of the United States without the intervention of this court pursuant of the judicial code as amended.

3. That heretofore on the 10th day of November, 1921, these respondents filed in the office of the Clerk of the Supreme Court of Indiana their praecipe in writing for a transcript of the record, proceedings and judgment of said Supreme Court presenting as it does present, the said Federal question involved therein, as hereinbefore stated; that prior to the filing of said praecipe these respondents paid to the said Clerk an estimate of the cost of said record; that said Clerk of the Supreme Court of Indiana informs these respondents, and upon such information they state the fact to be that said transcript will be completed and ready for delivery to them within the next ten days.

4. That these respondents have written a brief for the purpose of presenting their petition to said Supreme Court of the United States and to the Justice thereof, for a writ of certiorari and a writ of error, or either of said writs; that at the present time more than two hundred pages of said brief are printed and said brief is ready for completion when respondents obtain the transcript of said record from the Clerk of the Supreme Court of Indiana, so that, from said transcript, these respondents may insert in said brief the proper page reference to contents of said transcript.

5. That these respondents are pursuing with due diligence their effort to take said cause for review, as aforesaid, to the Supreme Court of the United States; that it is their purpose to perfect and accomplish their said endeavors and present said cause, as aforesaid, to the Supreme Court of the United States within the time required therefor by the laws of the United States.

6. That prior to the filing of this petition in this cause, these respondents orally informed said Fidelity Trust Company and its attorneys that this cause was to be presented for review as aforesaid to the Supreme Court of the United States; that thereafter and prior to the filing of this petition for a Writ of Assistance, as these respondents are informed and believe, and upon information and belief they state the fact to be, that Charles E. Cox, one of the attorneys for the Fidelity Trust Company in this cause, went to the office of the Clerk of the Supreme Court of Indiana and made an examination of the record and made notation of the entries in this cause and of the said praecipe of these respondents for this record.

WHEREFORE, these respondents say that this court is without jurisdiction in the premises and they demand judgment that this proceeding abate, and they pray for all proper relief."

V

The Hamilton Circuit Court erred in overruling the demurrer of Dora E. Rooker and William V. Rooker to the petition for a Writ of Assistance as amended, by the Fidelity Trust Company, as Trustee of the estate of Dora E. Rooker, said demurrer being upon the grounds, to-wit:

"That there is a defect of parties plaintiff in said petition in this, to-wit: That upon the proceedings and judgment recited in said petition and the record of this court pertaining thereto, it is apparent that said judgment is the joint judgment of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company, in its corporate capacity proper, is not a co-petitioner in said petition nor is it made a defendant to answer thereto nor in any wise required to assert its interest in the premises, nor is there any showing in said petition that said interest of the Fidelity Trust Company in its corporate capacity proper has been transferred to and is held by the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker; that said Fidelity Trust Company in its corporate capacity proper should be joined as a co-petitioner in said petition or it should be named as a defendant thereto and the reasons shown why said Fidelity Trust Company in its corporate capacity proper fails to join in said petition.

2. That there is a defect of parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that the Wainwright Trust Company is receiver of the lands in controversy situate in Hamilton County in the State of Indiana; that said receiver is a necessary and proper person to these proceedings and said petition should require the Wainwright Trust Company to appear and answer as to its interest in the premises.

3. That there is a defect of the parties defendant in said petition apparent upon the face of the record in this, to-wit: That it is named in said petition that Thomas West is tenant of the lands in controversy situate in Hamilton County in the State of Indiana; that said tenant is a necessary and proper person to these proceedings and said petition should require the said Thomas West to appear and answer as to his interests in the premises.

5. That said petition does not state facts sufficient to constitute a cause of action as a petition for a writ of assistance.

6. That said petition as amended is not verified.

MEMORANDUM

For their memorandum with their demurrer in respect of the insufficiency of said petition to state a cause of action these plaintiffs say:

1. That the judgment sued on is a joint judgment and can not be enforced singly.

2. That the Fidelity Trust Company, Trustee, is not the real party in interest.

3. That it is not shown that the Fidelity Trust Company in its corporate capacity proper withholds its consent from this proceedings.

4. That the Writ of Assistance is not a primary writ but is issued only in aid of a prior process of court and that no such process has been issued out of this court on this judgment.

5. That no execution ever has been issued on the judgment and decree of court mentioned in said petition."

VI

The Hamilton Circuit Court of Indiana had no jurisdiction to enter upon the execution of the mandate of the Supreme Court of Indiana pursuant of its opinion and judgment while the same was pending for review in the Supreme Court of the United States, and the proceedings had in said Hamilton Circuit Court in the premises were *coram non judice* and void.

VII

The Hamilton Circuit Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate because by their deeds of trust they had sold and conveyed the trust estate to the trustee in its own right and the Trustee had purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal

protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

VIII

The Hamilton Circuit Court of Indiana erred in accepting and applying opinions, judgments and mandates of the Supreme Court of Indiana as meaning and directing that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement, by holding that Dora E. Rooker and William V. Rooker were incompetent and disqualified to redeem and defend the trust estate, because by their deeds of trust they had sold and conveyed the trust estate to the Trustee in its own right and the trustee and purchased the trust estate in its own right, and by said denial said Hamilton Circuit Court took the property of the said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

IX

The Supreme Court of Indiana erred in denying Dora E. Rooker and William V. Rooker their day in court to redeem and defend the trust estate from the Trustee upon its repudiation of the trust agreement by holding that to entertain the objections of Dora E. Rooker and William V. Rooker to the illegality of the joint counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker would work to the harm and prejudice and financial loss of the Trustee and to the undeserved gain of the said Dora E. Rooker and William V. Rooker and by said denial said Supreme Court of Indiana took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

X

The Hamilton Circuit Court of Indiana erred in accepting and applying the opinion, judgment and mandate of the

Supreme Court of Indiana as meaning that Dora E. Rooker and William V. Rooker could, and should, be denied their day in court to challenge the illegality of the joint counterclaim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as Trustee of the estate of Dora E. Rooker, because to entertain that challenge would work to the harm and prejudice of said Trustee and to the undeserved gain of said Dora E. Rooker and William V. Rooker, and by said denial said Hamilton Circuit Court took the property of said Dora E. Rooker and William V. Rooker without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

PRAYER FOR REVERSAL

WHEREFORE and upon consideration of the several supplemental errors herein assigned, as well as upon the errors assigned in the original assignment of errors, which are hereby reaffirmed, and because of the numerous errors apparent upon the face of the record all to the wrongful prejudice of these plaintiffs in error, they humbly pray that the judgment of the Supreme Court of Indiana and the judgment of the Hamilton Circuit Court of Indiana, be in all things reversed and the plaintiffs in error be awarded all proper relief.

William Velpeau Rooker,
Attorney for Plaintiffs in Error.

Floyd G. Christian,
Ralph H. Waltz,
Of Counsel.